



EXHIBIT 2  
DATE 3/7/13  
HB 2 American Civil Liberties Union  
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## INDIGENT DEFENSE IN MONTANA

Inadequate indigent defense has been an issue for decades. In fact, Montana first began examining the issue 35 years ago when the National Legal Aid and Defender Association received a grant from the federal Law Enforcement Assistance Association (LEAA) to provide technical assistance to state indigent defense systems.

**1974:** LEAA established the National Center for Defense Management (NCDM) whose mission was “to improve the efficiency of systems for the defense of the poor, to maximize their quality and to maintain their cost-effectiveness through sound planning, management assistance and management training.”

**1975:** The Montana Legal Services Corporation Board of Trustees urged the Montana Board of Crime Control to request a technical assistance grant from NCDM to interview representatives of various Montana organizations and agencies, soliciting their views concerning indigent defense services in the state. They focused their analysis on three jurisdictions -- Yellowstone County, Flathead County, and the 16<sup>th</sup> Judicial District (Fallon, Powder River, Carter, Custer, Rosebud, Prairie and Garfield Counties).

**1976:** NCDM issued their report *Montana Statewide Defender Systems Development Study* finding that the failure of practitioners to adhere to prevailing criminal justice standards was not simply an “occasional omission” or “isolated defect,” but the result of a “substandard system of indigent criminal justice.”

**2002:** The American Civil Liberties Union (ACLU) filed a class action lawsuit against the State of Montana alleging constitutional deficiencies in the delivery of the right to counsel (*White v. Martz*). In addition to Governor Martz, defendants included the Supreme Court Administrator; Appellate Defender Commissioners; District Court Council members; and county commissioners from Missoula, Butte-Silver Bow, Flathead, Glacier, Lake, Ravalli and Teton counties.

Defendants moved to have the suit dismissed. Their motions were denied in their entirety by the Court.

An order granted class certification to all indigent persons who had or would have cases pending in the courts of those counties and who relied on those counties and the relevant county commissioners to provide them with defense counsel.

Plaintiffs conducted extensive discovery, including taking the depositions of more than 80 witnesses, including then current and former public defenders from each of the seven counties in the suit, various state and county officials, and members of the Appellate Defender Commission.

**2003:** The Montana Legislature made an attempt to address some of the issues raised by the complaint but it was too little, too late. The Interim Law and Justice Committee then took on indigent defense as



its highest priority. Rep. Mike Lange chaired that committee. Harry Freeborn served as the legislative counsel staff person for the committee.

A pre-trial scheduling order was signed by the Court in December 2003, and a trial date was set for the following May. Plaintiffs and defendants provided each other with expert witness disclosures, intended trial exhibits and deposition designations in accordance with the pre-trial scheduling order.

**March 2004:** At a meeting of Interim Law and Justice Committee, Mike Sherwood articulated the differences between what commissioners might expect in a criminal trial depending on whether they hired private counsel or had a public defender, showing Montana's two-tiered justice system -- one for people of means, and one for people without.

At that time the state of Montana approached the ACLU about a settlement.

All parties agreed that a properly funded statewide public defender system must have sufficient administrative and financial resources to ensure that indigent criminal defendants receive constitutionally and statutorily adequate legal representation and that the Montana State Legislature must be included in the formulation of a statewide system remedy.

**May 2004:** The Stipulation and Order of Postponement of Trial was agreed upon by the counsel in the case and signed by Montana State District Court Judge Thomas C. Honzel. *White v. Martz* was held in abeyance to permit the Montana State Legislature to pass legislation during its 2005 session to adequately address the indigent defense system.

**April 2005:** SB 146, sponsored by Sens. Dan McGee and Mike Wheat, was signed into law creating the Statewide Public Defender System. The law received unanimous support in the Senate and 89 percent support in the House.

**August 2005:** *White v. Martz* is dismissed.

**July 2006:** The Office of the State Public Defender assumed responsibility for statewide public defender services, previously provided by cities and counties. These services are now provided statewide through regional offices of the State Public Defender.

(i) for a person charged with a felony or charged with a misdemeanor for which there is a possibility of incarceration, as provided in 46-8-101;

(ii) for a party in a proceeding to determine parentage under the Uniform Parentage Act, as provided in 40-6-119;

(iii) for a parent, guardian, or other person with physical or legal custody of a child or youth in any removal, placement, or termination proceeding pursuant 41-3-422 and as required under the federal Indian Child Welfare Act, as provided in [section 15];

(iv) for an applicant for sentence review pursuant to Title 46, chapter 18, part 9;

(v) for a petitioner in a proceeding for postconviction relief, as provided in 46-21-201;

(vi) for a petitioner in a habeas corpus proceeding pursuant to Title 46, chapter 22;

(vii) for a parent or guardian in a proceeding for the involuntary commitment of a developmentally disabled person to a residential facility, as provided in 53-20-112;

(viii) for a respondent in a proceeding for involuntary commitment for a mental disorder, as provided in 53-21-116;

(ix) for a respondent in a proceeding for the involuntary commitment of a person for alcoholism, as provided in 53-24-302; and

(x) for a witness in a criminal grand jury proceeding, as provided in 46-4-304.

(b) in cases in which a person is entitled by law to the assistance of counsel at public expense regardless of the person's financial ability to retain private counsel, as follows:

(i) as provided for in [section 15];

(ii) for a youth in a proceeding under the Montana Youth Court Act alleging a youth is delinquent or in need of intervention, as provided in 41-5-1413, and in a prosecution under the Extended Jurisdiction Prosecution Act, as provided in 41-5-1607;

(iii) for a juvenile entitled to assigned counsel in a proceeding under the Interstate Compact on Juveniles, as provided in 41-6-101;

(iv) for a minor who petitions for a waiver of parental notification requirements under the Parental Notice of Abortion Act, as provided in 50-20-212;

(v) for a respondent in a proceeding for the involuntary commitment of a developmentally disabled person to a residential facility, as provided in 53-20-112;

(vi) for a minor voluntarily committed to a mental health facility, as provided in 53-21-112;

(vii) for a person who is the subject of a petition for the appointment of a guardian or conservator in a proceeding under the provisions of the Uniform Probate Code in Title 72, chapter 5;

(viii) for a ward when the ward's guardian has filed a petition to require medical treatment for a mental disorder of the ward, as provided in 72-5-322; and

(c) for an eligible appellant in an appeal of a proceeding listed in this subsection (



BILLINGS GAZETTE

## Gazette opinion: Montana will pay for public defenders or for another lawsuit

14 HOURS AGO

The caseload of Montana's Office of the State Public Defender increased 12.3 percent between fiscal years 2011 and 2012, growing from 27,500 cases to 30,900.

Those cases include some of the most serious and complex criminal cases filed in the state. About 20 percent of the public defender case load is representing parents and children in civil abuse and neglect cases.

The public defender office as well as county attorneys have made a solid case for adequate increases in the public defender budget. The chairman of the appropriations subcommittee has acknowledged the problem of overworked and underpaid defenders. The challenge is funding.

On Tuesday, the appropriations subcommittee approved a budget that would add eight full-time-equivalent attorneys to the defender staff.

The governor's budget proposed 37.

"We need 77," said Richard E. "Fritz" Gillespie, chairman of the Public Defender Commission.

The needed number was determined based on the caseload and the ethical standards of the American Bar Association that require attorneys to limit their caseload so they can provide each client with effective representation. In a letter Gillespie delivered Tuesday to members of the appropriations subcommittee, he said the public defender office must take steps to limit case assignments in Region 4, which includes Lewis and Clark, Broadwater and Jefferson counties.

Only two of the 11 attorneys now in that regional office were working there when the 2011 Legislature met. Turnover is a problem throughout all defender regions because of low pay and high workloads, Gillespie said.

Public defenders regularly resign to take other government jobs that pay several thousand or even \$20,000 a year more. The defenders office has been unable to hire sufficient private attorneys to take cases for the \$60 per hour it pays because that is half of the usual rate. Furthermore, the defender office can't afford to hire many outside contract attorneys because \$60 is significantly more than it pays staff attorneys.

At a meeting on Feb. 15, all six members of the Public Defender Commission attending voted in favor of a resolution saying in part:

- Caseloads in criminal and civil cases continue to increase in fiscal year 2013.
- Office of the State Public Defender's salary structure is not competitive with the salaries and benefits offered by municipalities, counties, other state agencies and the private sector.
- The commission authorizes the chief public defender to take any and all actions necessary to align caseloads with resources, including, but not limited to consulting judges and prosecutors and limiting acceptance of new case assignments.

The Office of the State Public Defender was created by the Legislature after the state had been sued because not all counties were providing adequate indigent defense. The cost-conscious 2013 Legislature must weigh the expense of hiring more public defenders against the certainty that the state will be sued again if it fails to provide the defenders required by law.

The Montana justice system must have the resources to function well. County attorneys and judges can't do their jobs unless defenders are available to do theirs. Defendants who don't receive effective representation can go back to court to seek reversal of convictions on that basis. Ultimately, doing things the right way, the first time is the best, least-cost strategy. We urge lawmakers to consider the full picture and commit adequate funding to public defenders.